

AMERICAN COLLOID CO.

IBLA 89-373

Decided November 19, 1989

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, declaring two placer mining claims null and void ab initio.  
W MC 62785 and W MC 62786.

Reversed and remanded.

1. Mining Claims: Location--Mining Claims: Relocation

Where the evidence establishes that a mineral location made in 1954 when the land embraced thereby was open to location was not an amendment of an earlier location made in 1947 when the land was closed to mineral entry, a BLM decision holding the 1954 location null and void ab initio will be reversed.

APPEARANCES: R. Dennis Ickes, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

American Colloid Company (ACC) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated March 9, 1988, declaring two placer mining claims, W MC 62785 and W MC 62786, located on April 16, 1954, null and void ab initio. 1/ These two claims, known as the Bethel #1 and #2, embrace lands in sec. 28, T. 52 N., R. 102 W., sixth principal meridian, Park County, Wyoming.

These two claims were among a number of claims originally recorded by appellant on behalf of its predecessors-in-interest 2/ under section 314

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1/ On Sept. 13, 1989, appellant requested that the Board expedite consideration of this matter due to the fact that appellant was contractually required to deliver various quantities of bentonite deposited on the claims before the end of the year. Accordingly, we had determined to take this case out of order.

2/ The original locators of these claims were Fred S. Gail, Walter P. Gail, Coy L. Gail, R. P. Pedersen, Kenneth Lundvall, Bethel G. Hoge, and Charles Gawthrop. These claims were originally worked by appellant under a lease agreement. By agreement dated Dec. 15, 1985, appellant obtained a quitclaim deed for these claims from the prior owners.

of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), on December 29, 1978. By Secretarial Order dated May 2, 1919, various lands in T. 52 N., R. 102 W., had been withdrawn from public entry under a first-form withdrawal issued pursuant to section 3 of the Act of June 17, 1902, 43 U.S.C. § 416 (1970) (amended by section 704(a) of FLPMA, 90 Stat. 2792), for the Shoshone Reclamation Project. Included in this withdrawal were all lands in sec. 28. On February 26, 1954, the S½ NE¼, N½ SE¼, SE¼ SE¼, and lot 5 sec. 28 were open to location and entry under the mining laws, effective 35 days thereafter, subject to the requirement that a specified stipulation be executed prior to making a mineral location. See 19 FR 1225 (Mar. 4, 1954).

In its decision below, BLM determined that location notices filed by appellant's predecessors after the lands were reopened had been amendments of prior location notices filed on September 12, 1947, when the lands were not open to mineral location. BLM held that, since the 1954 notices were amendments of prior locations, which prior locations were themselves null and void ab initio, the 1954 amended locations must be considered null and void ab initio. From this decision, ACC timely pursued the instant appeal. While the records filed with the Department are somewhat obscure, we believe that they are more than sufficient to establish that the BLM decision is both factually and legally deficient and must be reversed.

In its statement of reasons, appellant contends that BLM misinter-preted location notices dated April 16, 1954, as amending claims located on September 12, 1947. Appellant points out that while the 1954 and 1947 locations are found in the same township and range, they are located in different sections and do not embrace the same lands. Appellant argues that the 1954 notices locating its claims neither purported to nor could amend the 1947 notices referenced by BLM but, rather, documented new claims originally located in April 1954, after the lands described therein had been reopened to mineral entry. We agree.

[1] BLM records indicate that on September 12, 1947, appellant's predecessors-in-interest located two claims, denominated the Bethel No. 1 and the Bethel No. 2, for various lands in SE¼ sec. 21 and SW¼ sec. 22, T. 52 N., R. 102 W. These locations were recorded in the Park County Courthouse on October 10, 1947, in Book 126, pages 98-99. As appellant notes, the 1954 locations of the Bethel #1 and #2, other than sharing a similar name with the 1947 locations and being made by some, though not all of the locators who filed the 1947 locations, have no other similari-ties with the earlier locations. Moreover, while the lands in secs. 21 and 22 embraced by the 1947 Bethel claims were originally withdrawn for the Shoshone Reclamation Project, these lands had been restored to mineral entry on April 1, 1926, and October 21, 1930, respectively. Thus, those locations were not null and void ab initio when they were made.

As noted above, the 1954 location notices, filed for recordation in Park County on April 17, 1954, in Book 189, pages 463-64, embraced land in a totally different section. BLM's conclusion that they were intended to amend the 1947 claims is obviously premised solely on the similarity of the names. Moreover, in reaching this factual conclusion, BLM ignored other filings in the record which indicate that, while the original 1947

locations were, indeed, subsequently amended, they were amended not by the Bethel #1 and #2 claims, but by the Bethel #4 (W MC 62788) and Bethel #5 (W MC 62789) claims.

Thus, the 1947 Bethel No. 1 described the land within the claim as the S $\frac{1}{2}$  SE $\frac{1}{4}$ , south 40 acres of lot 1, south 40 acres of lot 2, sec. 21. <sup>3/</sup> The 1947 Bethel No. 2 described that claim as lots 1, 2, and S $\frac{1}{2}$  SW $\frac{1}{4}$  sec. 22. The December 1978 recordation filing included a Schedule A which listed the claims then being recorded. That document showed that a claim called the Bethel #4, located on May 15, 1954, embracing the S $\frac{1}{2}$  SE $\frac{1}{4}$  and lot 2, sec. 21, had been recorded in Park County at Book 190, page 260, while a claim named the Bethel #5, also located on May 15, 1954, embracing, inter alia, the S $\frac{1}{2}$  SW $\frac{1}{4}$  and lot 2, sec. 22, had been recorded at Book 190, page 261.

More importantly, the 1980 assessment filing indicated that the Bethel #4 claim had originally been recorded at Book 126, page 101, while the Bethel #5 claim had been recorded at Book 126, page 102. These references, of course, closely correlate with the original recordation of the 1947 Bethel Nos. 1 and 2 locations. Thus, the 1947 Bethel No. 1 was recorded at Book 126, page 98, while the Bethel No. 2 was recorded at Book 126, page 99. Based on the records before us, <sup>4/</sup> it seems likely that the 1947 Bethel Nos. 1 and 2 were part of a group of claims, a number of which were subsequently amended or relocated in 1954. There is, however, no evidence that the 1954 Bethel #1 and #2 claims were intended to amend the 1947 Bethel Nos. 1 and 2 locations. Rather, those 1947 claims were apparently amended by the 1954 Bethel #4 and #5 locations.

With these facts in mind, various conclusions can readily be ascertained. Quite apart from the legal impossibility of amending a claim by including totally new land, none of which had been in the original location (see Fairfield Mining Co., 89 IBLA 209, 210 (1985); Lairy Brookshire, 56 IBLA 73 (1981)), there is no evidence in the records before the Board that appellant ever intended the 1954 location of the Bethel #1 and #2 to effect anything other than an original location of the lands within sec. 28. Thus, those claims were, in fact, located at a time when the land was open to entry and BLM's decision must be reversed.

Moreover, since the land in secs. 21 and 22 was open to entry when the Bethel No. 1 and No. 2 were located in 1947, the 1954 amendment of those

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<sup>3/</sup> While a description of land as the "south forty acres of lot 1" might not be a proper land description for public land survey purposes (see, e.g., Duncan Miller, A-28767 (July 23, 1962)), this point is irrelevant to the issues presented by this appeal.

<sup>4/</sup> We do not possess the recordation files for the Bethel #4 and #5 claims (W MC 62788 and W MC 62789). It is possible that these files contain the actual descriptions of the 1947 locations referenced in the 1980 filing. While it is further possible that the 1947 Bethel Nos. 4 and 5 described land in sec. 28, we do not wish to speculate on this point herein. The State Office may wish to consult those records upon remand of these case files.

claims, presumably effectuated by the Bethel #4 and #5 locations, was not improper. Thus, with respect to the records under review, we can perceive no basis for a finding that any of the claims herein were null and void ab initio.

We do note, however, that documents in the record raise an issue not addressed in the decision on appeal. The Bethel #1 and #2 claims, among others, were included in a mineral patent application filed by ACC on July 3, 1986. A partial withdrawal of this application with respect to certain claims, including the Bethel #1 and #2, was filed with BLM on November 30, 1987. Thereafter, by letter to ACC dated February 3, 1988, the Chief, Branch of Mining Law and Solid Minerals, Wyoming State Office, closed BLM's file pertaining to the patent applications filed by ACC on July 3, 1986, including the Bethel claims #1 and #2.

In this letter, however, BLM noted that a review of the mining claim recordation files had failed to substantiate compliance with the stipulation requirement set forth in the order opening the land to mineral entry in 1954. 5/ BLM advised appellant that if it could not produce evidence showing that the required stipulation had been tendered prior to the location of these two claims, the claims "are null and void ab initio." Inasmuch as BLM has merely advised appellant of a possible consequence which might ensue should it be unable, at some future date, to show compliance with the opening order, further Board consideration of the issue is clearly unwarranted at this time. 6/

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5/ The opening order stated that a stipulation was "to be executed and acknowledged \* \* \* by the locators \* \* \* and recorded in the county records and in the United States Land and Survey Office at Cheyenne, Wyoming, before locations are made," as follows:

"The locator agrees that all prospecting, mining, and other use and operations on the lands covered by his mining location shall be subject to the reservation of right of way to the United States according to pro- viso of the act of Aug. 30, 1890 (26 Stat. 391; 43 U.S.C. sec. 945)."

6/ We also note, in passing, that by order dated Sept. 18, 1989, in Durtsche v. American Colloid Co., IBLA 89-494, we dismissed an appeal by Myron and Diane Durtsche from a decision of the Wyoming State Office rejecting a private contest against these claims for the reason, inter alia, that a mineral claimant did not have standing to bring a private contest. Moreover, in IMCO Services, 73 IBLA 374 (1983), this Board refused to instruct BLM to issue a decision at the request of a rival claimant with respect to compliance with the recordation requirements of FLPMA. See also Gold Depository & Loan Co. v. Brock, 69 IBLA 194 (1982). While BLM may well consider the information which Durtsche has tendered in arriving at any decision it may ultimately issue, Durtsche does not have standing to protest such action as BLM may decide to take before this Board. Rather, pursuant to 30 U.S.C. § 30 (1982), determination of questions relating to the right of possession of land, as between adverse mineral claimants, is committed to "a court of competent jurisdiction." See In re Pacific Coast Molybdenum, 68 IBLA 325 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office declaring appellant's placer mining claims W MC 62785 and W MC 62786 null and void ab initio is reversed.

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James L. Burski  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge